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Ralph O. Davis, Sr v. Marion Davis : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

THE ESTATE OF RALPH O. DAVIS, SR. or THE RALPH O. DAVIS, SR., TRUST,

Plaintiff and Appellant,

vs.

MARION DAVIS and DONNA DAVIS,

Defendants and Appellees,

MARION DAVIS and DONNA DAVIS,

Counterclaimants and Appellees,

vs.

THE ESTATE OF RALPH O. DAVIS, SR. or THE RALPH O. DA VIS, SR., TRUST,

Counterdefendant and Appellant.

REPLY BRIEF OF APPELLANT, THE ESTATE OF RALPH O. DAVIS, SR. or THE RALPH O. DAVIS, SR. TRUST

Appeal No. 20100176-CA
District Court No. 070401549

APPELLANT'S REPLY BRIEF

Appeal from Judgment by the Fourth Judicial District Court
The Honorable James R. Taylor

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RESPONSE TO THE APPELLEES' STATEMENT OF THE NATURE OF THE CASE

The Appellant, the Estate of Ralph O. Davis, Sr., or the Ralph O. Davis, Sr. Trust ("Ralph Davis Estate" or "The Trust") disputes the accuracy of several statements made by the Appellees, Marion and Donna Davis ("Marion and Donna") in their Statement of the Nature of the Case, as well as with the relevance of those statements.

First, Marion fails to apprise the court that when Ralph O. Davis, Sr. ("Ralph") and Sterling Davis ("Sterling"), entered the military and he remained at home to assist his father in farming the property, he was only 19-20 years old and assisted his father on the farm and did not exclusively run or manage the property. (R. 285, 390). Additionally, prior to the time that they went off to war, Ralph and Sterling both farmed the property off and on until 1941. (R. 277). Marion also fails to note that while Ralph was in the service, he sent money home to his parents. (R. 275). Marion states that he satisfied his father's debt on the farm just five year later in 1946, but produced no evidence other than his own testimony to support this factor and produced no evidence as to what amount he allegedly paid to satisfy the debt. (R. 390). It is clear that Marion's father made decisions regarding the farm at least up until the 1950s and that any amount allegedly paid by Marion did not prohibit his father from evenly distributing the interest in the property among all three brothers in 1950. (R. 390). In fact, Glen did not pass away until the 1960s and maintained control over the farm until his passing. (i.e. by requesting Sterling and Ralph give up their proceeds from the farm in 1955. (R. 281). Marion also did not rely on the farm for his family's maintenance; he spent most of his time working as a car salesman for 27 years and a cabinet maker for 7 years. (R. 284).

Marion acknowledged that in the late 1960s, 1970s, and in 1980 that the property was still being held by him for all three brothers. (R. 281, 280). And Marion specifically acknowledged that in 1980, "it was just convenient to leave it in my name." (R. 280). Although Marion talked to an attorney in 1980 about the property, he never communicated this to Ralph and never communicated to Ralph what the attorney told him and instead let his brother believe that he was holding the property for him. (R. 279).

Marion also asserts that Ralph received money from his parents that came from the farm and ultimately from Marion. (Appellees' Brief, 5). If this allegation is correct, if Ralph received money, it was provided to him by Glen and not by Marion or from the property. (R. 276). Even with this distribution, Ralph's father did not require Ralph to deed the property back to him (if it was already deeded to Ralph, the record is unclear when and if Ralph received any money) or took it into consideration in any deeding of the property to Ralph. (R. 276). Furthermore, Marion does not establish that he knew everything about his father's finances sufficient to know that the money came from the farm, such statement is only based on belief. (R. 276). The difference with the money that Sterling received was that it was received directly from a loan from the 1966 transfer of the title, this he never paid back. (R. 281). Marion never clarifies what improvements were made on the property. (R. 275). Marion fails to set forth that payment of the profits to Ralph and Sterling were stopped at his father's request and only at the fathers request and that Ralph and Sterling honored that request. (R. 274). Additionally, such proceeds that should have been received by Ralph and Sterling were contributed by them to the farm, and, contrary to Marion's assertions, show that Ralph and Sterling financially supported the farm from about 1955 until the present. (R. 274).

Finally, Marion fails to note that when he claims that Ralph gave up his interest, only Marion and Donna or Marion and Sterling were parties to those discussions and such statements cannot otherwise be verified. (R. 274). Different representations regarding the property and Ralph's interest in the property were being made to by Ralph to his children. (R. 258-271).

ARGUMENT

As set forth in the Ralph Davis Estate's original brief, because the granting of a motion for summary judgment deprives the non-moving party of their day in court, the appellate courts in Utah have on many occasions described the limited inquiry the trial court must make before the granting of such motion:

> Summary judgment is proper only if the pleadings, depositions, affidavits and admissions show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.

In re Williams' Estate, 10 Utah 2d 83, 348 P.2d 683 (1960)(See Rule 56 of the Utah Rules of Civil Procedure). A summary judgment movant must show both that there is no material issue of fact and that the movant is entitled to judgment as a matter of law. *Orvis v. Johnson*, 2008 UT 2, ¶ 6, 177 P.3d 600 (emphasis added).

Additionally, when a the trial court is asked to make a determination as to whether both a constructive trust and a repudiation occurred, such determinations are highly fact sensitive and not appropriately decided at the summary judgment stage, particularly those involving family members. *See*, *Golden Meadows Properties, LC v. Strand*, 2010 UT App 257, ¶ 26, 241 P.3d 375; *Russell Packard Development, Inc. v. Carson*, 2005 UT 14, ¶ 39, 180 P.3d 741; *Acott v. Tomlinson*, 9 Utah 2d 71 (Utah 1959), 337 P.2d 720; *Walker*

v. Walker, 17 Utah 2d 53, 404 P.2d 253 (1965); and *Rawlings v. Rawlings*, 2010 UT 52, 240 P.3d 754.

As set forth in the original brief by the Ralph Davis Estate, the trial court put the cart before the horse when it failed to first determine whether a constructive trust (wrongfully requiring a finding of wrongful conduct or misdeed) existed in 1966 when the property was transferred from Ralph and Sterling to Marion and Donna, and when Marion and Donna agreed via oral agreement to hold the property for Ralph and Sterling while they used the property for a loan to create improvements to their personal residence. (R. 332-334). This transfer had occurred successfully before in 1950 and none of the parties' had received any other evidence to doubt that the same result and understanding occurred among the parties. (R. 390). All of the facts when viewed in the light most favorable to the nonmoving party, the Ralph Davis Estate, demonstrate that both Marion and Ralph recognized that he was holding the property for Ralph. (R. 278-281, 253-271). Marion never stated to Ralph that he was not holding the property for Ralph's benefit. (R. 278-281, 253-271). Consequently, there were material issues of fact precluding the court from making a determination that a trust did not exist in 1966. *Orvis v. Johnson*, 2008 UT 2, ¶ 6, 177 P.3d 600 (emphasis added).

Next, the court failed to make a determination as to whether a repudiation of the trust by Marion existed sufficient to put Ralph on notice and to instigate the application of the discovery rule. Again, any determination of a repudiation of a trust is extremely fact-intensive and summary judgment should not be granted lightly. *See*, *Russell Packard*, 2005 UT 14; *Acott*, 9 Utah 2d 71; *Walker*, 17 Utah 2d 53; and *Rawlings v. Rawlings*, 2010 UT 52.

In their response to the Ralph Davis Estate's opening brief, Marion and Donna raise several arguments: (1) Marion and Donna assert that the Ralph Davis Estate failed to present any competent and sufficient evidence pursuant to Rule 56(f) to contradict a summary judgment motion and to support their causes of action; (2) Marion and Donna assert that Ralph Davis knew all the applicable facts to raise a cause of action in 1980 and that the statute of limitations ran four years later. (3) Marion and Donna assert that there was no concealment of these facts nor exceptional circumstances that would justify the application of the discovery rule until 2007. (4) Marion and Donna assert that because a constructive trust is an equitable remedy, there is no pre-existing trustee/beneficiary relationship from which to judge misconduct, repudiation, and a familial "exceptional circumstance" and that even if a familial "exceptional circumstance" existed justifying the discovery rule, it only applies to cases where there is an actual, express or implied trust and not to cases where a constructive trust is found, such statement is false under the Utah Supreme Court decision in *Rawlings*, 2010 UT 52; (5) Marion and Donna argue that there is no need to determine that a constructive trust existed, because even if the discovery rule is applied, it should be applied in 1980 and the Ralph Davis Estate is barred by the statute of limitations.

As will be articulated more fully below, these arguments fail because: (1) the Ralph Davis Estate relied on deposition and affidavit evidence to oppose the Plaintiff's summary judgment motion. Most of the facts setting forth material issues of fact are found directly in Marion's deposition testimony. The affidavits of Ralph's children only serve to supplement the inconsistencies found in Marion's deposition testimony. But, both individually and combined, such evidence conclusively demonstrates that there are

material issues of fact that required a weighing by the court to reach a decision, and as such, should have been a basis for the trial court to deny the summary judgment motion. (2) Contrary to Marion and Donna's assertions, Ralph, nor his heirs, were aware of the facts necessary to assert a cause of action in 1980, in 1990, and not until 2005 when Marion indicated to Ralph's heirs that he solely claimed the property. There are material issues of fact as to what was communicated to Ralph by Marion and whether Marion ever communicated an intention to retain the property that precludes summary judgment. Additionally, because Ralph and Marion were family, the standard for what knowledge Ralph was required to know was much lower to maintain use of the discovery rule. *Snow v. Rudd*, 2000 UT 20, 998 P.2d 262. Such communications support rather than diminish the understanding of Ralph that Marion continued to hold the property for him. (3) As set forth in *Rawlings*, a finding of a constructive trust does not require concealment or misconduct by the alleged trustee. 2010 UT 52. Marion and Donna took no or limited affirmative actions to communicate to Ralph that that they were holding the property for themselves. (4) There is no case law limiting the application of the familial "exceptional circumstances" to actual, express, or implied trusts, but is a remedy available when families members rely on and trust other family members in constructive trust situations. *See*, *Snow*, 2000 UT 20; *Acott*, 9 Utah 2d 71; and *Walker*, 17 Utah 2d 53. (5) When reviewed in the light most favorable to the nonmoving party, the Ralph Davis Estate, there are material facts disputing that Ralph Davis was aware that a repudiation of the trust had occurred by Marion and Donna, instead the facts support a finding that no repudiation occurred, that the statute of limitations was tolled, and that the Ralph Davis Estate timely filed their compliant in this matter in 2007.

Finally, the trial court failed to review all of the facts and reasonable inferences in the light most favorable to the nonmoving party, the Ralph Davis Estate, and it improperly weighed facts to reach its decision in granting Marion and Donna their summary judgment motion as to a finding that there was no constructive trust and that the discovery rule did not apply.

I. APPELLEES FAIL TO REFUTE THAT THERE ARE ISSUES OF MATERIAL FACT PRECLUDING SUMMARY JUDGMENT.

In determining whether to grant a motion for summary judgment, a trial court should review the facts and all reasonable inferences drawn in the light most favorable to the nonmoving party. *Lakeside Lumber Products, Inc. v. Evans*, 2005 UT App 87, ¶ 8, 110 P.3d 15. "[O]n a motion for summary judgment, a trial court should not weigh disputed evidence and its sole inquiry should be whether material issues of fact exist." *Draper City v. Estate of Bernardo*, 888 P.2d 1097, 1101 (Utah 1995). Marion and Donna furthermore assert that if the nonmoving party is the plaintiff, that the plaintiff must provide "evidence, by affidavit or otherwise, in support of the essential elements of his claim." In the instant matter, there were material issues of fact that the trial court improperly weighed to grant summary judgment. Additionally, the Ralph Davis Estate supported their claims with sufficient evidence to overcome the motion for summary judgment.

Marion and Donna assert that the Ralph Davis Estate "failed to identify with specificity any material fact" to (1) oppose the summary judgment and (2) failed to support their claims with admissible evidence. Such statements are in error. In support of their opposition, the Ralph Davis Estate not only provided affidavits of Ralph's children

affirming their knowledge of their father's intent and thoughts concerning Marion and the property, the Estate also supports its arguments with the Deposition of Marion, which deposition contains several statements which create material issues of fact.

There is no dispute that in 1966, Ralph and Dorothy Davis signed a Warranty Deed conveying their 1/3 interest to Marion and Donna Davis. (R. 389). There is no dispute that in 1950, Marion and Donna requested that Sterling and Ralph loan their interest in the property to Marion and Donna for the purpose of obtaining a loan. (R. 390). There is no dispute that the property was deeded back to Sterling and Ralph via Warranty Deed in 1951. (R. 390). There is no dispute that on or about 1966, Marion again asked Ralph to use his 1/3 interest as security in order to get another loan for Marion and Sterling. (R. 282). Ralph agreed and a deed was recorded on or about August 29, 1966. (R. 282).

As set forth above, Marion's deposition sets forth the following facts that support the Estate of Ralph Davis' claims (1) that a trust was created in Ralph's favor in 1966 and (2) that a repudiation never occurred by Marion. Specifically, the property was originally not distributed to the brothers until after all debt on the property was paid off. (R. 276). Any, if any, money obtained by Ralph from his parents, was not obtained from Marion, but was given to Ralph by his parents and no change in the deeds was required by his parents if, and when the money was distributed, Marion only believes that it came from him. (R. 276). Because Ralph provided money to his parents from his service in the war, that money could have been what was provided to him at a later date. (R. 275). Marion in his deposition sets forth no personal knowledge where the money that was allegedly provided to Ralph came from. (R. 275). In 1950, the brothers accomplished a similar

transaction to the 1966 transfer where all parties understood that Marion was holding the property only to obtain a loan from the bank, the property was later transferred back to all of the brothers. (R. 390). The 1966 transfer was initiated just as to the 1950 transfer and Ralph had no reason to believe that the property would not be transferred back to him at a later date based on representations by Marion and the 1950 experience. (R. 390) Contrary to Marion's representations, Ralph and Sterling contributed to the payment of the costs and improvements of the farm when they were asked by their father (after the property was deeded in their names) to allow Marion to use those distributions for the purpose of running the farm. (R. 274). Marion did not cut off the distributions and such stoppage of distributions would not have provided any indication of his intent to own the property outright since it occurred in 1955, prior to the 1966 transfer, and was voluntary on the brothers' part for the purpose of assisting in the running and management of the farm. (R. 274). Marion attempts to characterize Ralph and Sterling as not assisting financially in the farm, but their willingness to allow Marion to keep their portion of the proceeds from the farm for the running of the farm clearly indicates that they gave up income to support the farm. Marion's own deposition asserts that his brothers retained interest to the property in 1966 when the property was transferred to him and that the transfer would be similar to the 1950 transfer. (R. 390). There is a clear material issue of fact supported by competent evidence in the 1980 letter sent from Ralph to Marion that reaffirms the parties' understanding that Ralph maintained a one-third interest in the property.(R.238-243). Marion and Donna fail to recognize that this clear affirmation of beneficial ownership by Ralph was not disputed by Marion. Although Marion may have consulted with an attorney, he never indicated or told Ralph that he had no intention of giving the

property back to Ralph.(R. 279). In 1990, Marion again provided no indication to Ralph that he would not give at least a portion of the property back to Ralph. (R. 245-247). Marion and Donna also fail to recognize that their March 1990 letter to Ralph clearly recognizes Ralph's ownership/interest in the property. (R. 245-247). And the parties were clearly still in negotiations as to how the property would be distributed, nothing in the letter provided Ralph with concern that he would not receive a return of his property from Marion. (R. 245-247). All these are facts from Marion's deposition and letter's exchanged by the parties as included in the Ralph Davis Estate's Opposition to Summary Judgment Motion clearly show that a constructive trust was established and that no repudiation of the trust ever occurred to put Ralph on notice of his need to file suit against his brother.

Additionally, the affidavits of Ralph's children also support that Ralph continued to believe that the property would be returned to him at the proper time and that Ralph continued to believe that he had a surviving interest in the property.(R. 258-271).

Glen Richard Davis was a participant in conversations with his father and was instructed that Marion use the property, which Marion was holding the property for his father, and that Marion would return the property when he no longer was using the property. (R. 263-266).

Glen Richard Davis participated in conversations after 1997 and 1998 where his father reaffirmed to him his ownership in the property. (R. 263-266).

Ralph Davis, Jr. spent approximately eight weeks with his father, prior to his death on February 25, 2005, and was told by his father that Marion would return the full third of the property. (R. 258-261).

Marion asserts that these affidavits were correctly not considered by the trial court, however, as set forth in the Ralph Davis Estates' original brief and later within this brief, the court erred when it failed to consider these affidavits at the summary judgment stage.

Finally, it is irrelevant at this juncture what amount Marion contributed to the farm as compared to Ralph and to Sterling, those are factual matters that are appropriately figured in at a trial stage and inappropriately weighed or considered by a trial court at the summary judgment stage, particularly if weighed to determine who contributed most to the property.

All of the above are material issues of fact supported by Marion's own deposition and communications that precluded a grant of summary judgment to Marion and Donna pursuant to Rule 56 of the Utah Rules of Civil Procedure.

II. THE APPELLEES INCORRECTLY ASSERT THAT THERE IS NO FAMILIAL RELATIONSHIP EXCEPTIONAL CIRCUMSTANCE TO THE DISCOVERY RULE. A FAMILIAL RELATIONSHIP IS CONSIDERED AN EXCEPTIONAL RULE THAT TOLLS THE STATUTE OF LIMITIATONS UNDER THE DISCOVERY RULE.

The trial court erred in its application of law when it found that the discovery rule was not applicable and determined that the statute of limitations barred the Ralph Davis Estate from pursuing its claims against Marion and Donna. In their brief, Marion and Donna are incorrect in their assertion that (1) there is no familial exceptional circumstance and (2) that the Ralph Davis Estate knew all of the facts forming the basis for a cause of action in 1980. (Appellees' Brief, 10).

Pursuant to both *Snow* and *Walker*, a familial relationship is considered to be an exceptional circumstance wherein a court applies a higher standard of a repudiation of a trust when determining that the discovery rule applies and the statute of limitations is

tolled. 2010 UT 20, ¶ 11; 17 Utah 2d 53. Marion and Donna attempt to confuse the familial relationship exceptional circumstance by stating that such exceptional circumstance only applies to actual, express, and implied trusts rather than to the constructive trust that should have been found in the instant matter. (Appellant Brief, 11). Such statement is not supported by any case law or statute and a family member who places trust in another family member who did not disclose their intent, would be severely prejudiced by such restriction. *Snow*, 2010 UT 20; *Walker*, 17 Utah 2d 53; *Acott*, 9 Utah 2d 71. Finally, Marion and Donna claim, that regardless, Ralph and his heirs were aware of all of the facts necessary to state a cause of action in 1980. As set forth above and again reiterated in this section, Ralph was not aware of any reason to doubt his trust in his brother and based on their familial relationship continued to believe until his death that Marion was holding the property for him. Furthermore, the 1990 letter from Marion to Ralph reaffirms that he is holding Ralph's beneficial interest as a trustee. Finally, because of the familial relationship exceptional circumstances, much more is needed than in other non-familial trust cases. *Walker*, 17 Utah 2d 53, 59.

A. Discovery Rule and Familial Relationship Exceptional Circumstance.

Marion and Donna claim that Ralph and his heirs knowingly sat on their rights and should not benefit from any tolling of the statute of limitations and claim that a 27 year time span is too long for the discovery rule to apply. (Appellees' Brief, 12). Marion and Donna appear to base this claim solely on the statements from *In re Hoopiiaina Trust* that it limits when it later sets forth the two prongs of the discovery rule: "(1) where a plaintiff does not become aware of the cause of action because of the defendant's concealment or misleading conduct, and (2) where the case presents exceptional circumstances and the

application of the general rule would be irrational or unjust." 2006 UT 53, ¶ 35, (quoting *Russell Packard*, 2005 UT 14, ¶ 21, 35). Furthermore, *Hoopiiaina* focused only on the first prong and did not address the second prong of the discovery rule, which is the relevant prong in this case and did not address the familial relationship exceptional circumstance as set forth in *Snow*, *Acott* and *Walker*. 2006 UT 53. Consequently, this court must rely on *Snow*, *Acott*, and *Walker*, for analyses of the familial relationship exceptional circumstance and not stop at the *Hoopiiaina* concealment inquiry as proposed by Marion and Donna.

Relying on *Acott* and *Walker*, the *Snow* court found a familial relationship exceptional circumstance, determined that the weighing test was already accomplished in those cases, and required the application of the discovery rule and tolling of the statute of limitations, as set forth more fully in the Ralph Davis Estate brief. *See*, 2000 UT 20, ¶ 11. The *Snow* court also recognized the *Walker* court's determination that not just a normal repudiation is required, but an overt clear repudiation is required in familial situations. *Id.* and 17 Utah 2d at 58. Specifically,

> [w]here a near relative is involved courts are less inclined to find a repudiation. This is so because of the greater likelihood that the beneficiaries have reposed confidence in him; and also, they would have a natural reluctance to sue him unless circumstances forced them to do so.
>
> *Id.* at 59 (emphasis added).

In the instant case, as set forth more fully in the recitation of facts above, a clear repudiation of the constructive trust cannot be established. Marion never stated to Ralph that he did not have an interest in the property and reaffirmed that he had an interest in 1990 and Ralph continued to believe until his death that the negotiations would continue

and that Marion would return the property to him and Ralph was never forced to sue. (R. 245-247, R. 258-271).

Further, the application of the familial relationship exceptional circumstance does not require a concealment or misdeed as suggested by Marion and Donna in their brief, nor is a weighing test required if a concealment or misdeed does not occur. (Appellees' Brief, 13). A review of the *Walker* and *Acott*, as relied on by *Snow*, demonstrate that no such misdeed was found in either case and that they are very similar to the instant case. *See* , 2000 UT 20, 17 Utah 2d at 57-59, 9 Utah 2d 71. Specifically, like Marion, in *Walker*, "somewhere along the line [the trustee] formed the intention of claiming [the property] for his own." *Id.* at 59. There was no overt act, concealment, or trustee misconduct in *Walker*, only a familial relationship wherein family members reposed their trust and did not doubt his true intentions. *Id.* at 53-57. Additionally, similar to the *Walker* trustee, Marion never asked for assistance, even though in this case, Marion received assistance as detailed more fully above by Ralph and Sterling agreeing to allow him to use their proceeds from the farm to maintain and improve the property. *Id.* and (R. 274).

Additionally, like *Acott* as set forth more fully in the Appellant's first brief, title was transferred on two different occasions and a history of trust was established by the first successful transfer. 17 Utah 2d and (R. 390).

Therefore, the familial relationship special circumstance applies despite no misdeeds and a weighing is not required, as *Snow* stated it has already been done in *Acott* and *Walker*. 9 Utah 2d 71; 17 Utah 2d 53; *See also*, *Snow*, 2000 UT 20. Particularly as this case exemplifies the concern of the *Acott*, *Walker*, and *Snow* Courts "that to not

apply the discovery rule would lead to unjust results because of the close familial relationship involved." *Snow*, 2000 UT at ¶ 11 (internal citations and quotations omitted).

Even if weighing was necessary, material issues of fact prohibit a finding of summary judgment based on such weighing. *Id.* (quoting *Sevy v. Security Title Co.* 902 P. 2d 629, 636 (Utah 1995). Despite Marion and Donna's claim, it does not matter that Ralph is unavailable to testify; in *Walker*, parties were also unavailable to testify. 17 Utah 2d at 53-58. It does not matter that 27 years passed; in *Walker*, 40 years passed. *Id.* In *Rawlings*, 30 years passed before a constructive trust was found and the father in that case was also deceased and unavailable. 2010 UT 52. Additionally, in this case, Marion should not benefit when Ralph contributed to the maintenance of the property since 1955, when Ralph relied on affirmations in 1980 and 1990 from Marion of his interest, when negotiations were ongoing, and when both Marion understood that it was easier to keep the property in his name and Ralph saw no need to require a transfer while Marion used the property. At a minimum, material issues of fact prevent a summary judgment disallowing a tolling of the statute of limitations. Furthermore, factual weighing is prohibited at the summary judgment stage. *Orvis*, 2008 UT 2.

B. Repudiation.

Next, Marion and Donna assert that the familial relationship rule applies "only to cases in which an actual or express trust exists" but provide no support for this statement. (Appellees' Brief, 11). In *Snow*, the court never delimits the application of this familial relationship exceptional circumstance. 2000 UT 20. Instead, the term "trust" is always addressed in general terms and not defined to apply to any one type of trust. *Id.* Further, in *Snow*, the court determined that the statute did not toll not because the trust was a "an

actual or express trust", but because the Plaintiff saw the documents evidencing a transfer and repudiation of the trust years before she filed suit. *Id.* at ¶ 12.

Marion and Donna next assert that requiring a clear repudiation would be problematic in that the trustee would not know his duties until after a determination of a constructive trust. (Appellees' Brief, 11). Such statement is inaccurate and defeats the purpose of creating a constructive trust in the first place. Although not limited to specific situations, a constructive trust often occurs when there is knowledge that a party is holding the property for another or when others could have an interest in the property or have contributed to the property, even without misconduct. *Rawlings*, 2010 UT 52. Such case occurred in *Rawlings*. Thus, some showing of complete ownership in the property is necessary for the holder of the property to prohibit application of the discovery rule. If the discovery rule was not allowed to apply, the purpose of a constructive trust would be defeated because, as in *Rawlings* and in this case, family members reposing their trust over multiple years in their siblings or family members would unknowingly lose interest in their property. *Id.* This is the exact purpose of a constructive trust and of the familial relationship exceptional circumstance, to ensure that those family members are not taken advantage of by their misplaced, but reasonable trust. Furthermore and as set forth above, with respect to family members, the courts have already determined that "it is appropriate to protect the interests of a beneficiary by applying the discovery rule to toll the statute of limitations until the beneficiary knows or should know of the alleged breach or repudiation." *Snow*, 2000 UT at ¶ 11.

Rawlings further supports a finding that such familial relationship exceptional circumstance is appropriate in applying the discovery rule, in that the tolling of a statute it

upheld a trial court's determination that tolling occurred among family members and where the statute of limitations was tolled until the siblings were acutely first made aware that their sibling considered the property his alone. 2010 UT 52, where family members are involved:

Further, in *Rawlings*, a footnote by the Supreme Court supports the tolling of a statute in familial situations until the time that the person holding legal title to the property asserts full ownership (both legal and equitable). 2010 UT 52, ¶ 12, ftnt 5. Specifically, in *Rawlings*, even though Donald determined that he owned the property, the statute was tolled 30 years until he overtly asserted the ownership after their father's death. *Id.*

Next, Marion and Donna mistakenly characterize and assert that as of 1980 and again in 1990, that Ralph Davis and his heirs were aware of all of the facts necessary to assert their cause of action. This statement is incorrect as Marion did nothing to set forth repudiation of the trust or of Ralph's interest in the property. Instead in 1980 and 1990, Marion reaffirmed the trust as set forth more fully above. Ralph continued to believe that the property would be returned. And again, this case is distinguished from *Snow*, where the Plaintiff received actual documents transferring the entirety of the property out of trust and to another. 2000 UT 20. In the instant case, no such documents or clear indications that Marion considered the property solely his occurred.

Consequently, the discovery rule applies, or there are at least material issues of fact as to whether a repudiation occurred and the discovery rule applies which cannot be resolved at the summary judgment stage.

III. THE TRIAL COURT IMPROPERLY WEIGHED EVIDENCE AND THE REASONABLE INFERENCE DRAWN IN THE LIGHT MOST FAVORABLE TO THE NONMOVING PARTY SHOULD HAVE RESULTED IN A DENIAL OF THE SUMMARY JUDGMENT.

The trial court erred by weighing the evidence set forth in this case, which consisted both of affidavit and deposition testimony as set forth more fully above in Section I. When the evidence is viewed in its entirety, it is clear that Ralph did not understand that Marion had repudiated Ralph's interest in the property. Such repudiation did not occur in 1980. Such repudiation did not occur in 1990. Instead, the letters exchanged and responses to those letters, in conjunction with Marion's deposition testimony, affirm rather than deny that both Marion and Ralph understood that Ralph still had an interest in the property after these dates. Additionally, these letter in view of all of the evidence as set forth more fully above, are insufficient to start the statute of limitations based on the disputed material facts described more fully above. Further, the evidence demonstrates that Ralph was not put on notice to perform any inquiry to determine if Marion was asserting ownership to the entire property, because Marion affirmed that Ralph should receive some of the property.

IV. THE TRIAL COURT ERRED IN REFRAINING FROM IMPOSING AN EQUITABLE CONSTRUCTIVE TRUST BASED ON THE 1966 CONVEYANCE.

Marion and Donna err in their assertion that there was no reason for the court to apply a constructive trust in 1966 based on unjust enrichment. In making these arguments, Marion and Donna rely on cases that have recently been clarified by the Utah Supreme Court in *Rawlings*, which disabused that a misdeed or wrongful act is required to find the existence of a constructive trust. 2010 UT 52. Although Marion and Donna

recognize that the *Rawlings* came out after the trial court's decision in this case, they still appear to assert that in this case, active or "egregious misconduct" was required. (Appellees' Brief, 21). In *Rawlings*, Utah Supreme Court found that constructive trusts can been found in a number of ways, including under an unjust enrichment theory without a finding of active or egregious misconduct and such constructive trust may arise from an oral or written "manifestation of an intention to create it." 2010 UT 52, ¶ 26 (emphasis added). According to *Rawlings*, "a constructive trust may arise where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it" *Id.* at 29. As set forth in the Appellants' brief, the *Rawlings* court stated that, the requesting party must establish the requirements of unjust enrichment. In this case, the Ralph Davis Estate satisfies these requirements as set forth in their brief and the trial court should have found the existence of a constructive trust in 1966 or at least denied summary judgment for Marion and Donna. *Id.* at ¶ 29; *See also*, *Jeffs v. Stubbs*, 970 P.2d 1234, 1247-48 (Utah 1998).

As set forth in the Ralph Davis Estate's first brief, these requirements have been met. Marion and Donna received a benefit. That benefit was acknowledged by them and continued to be acknowledged by them. Marion and Donna now retain the property despite Ralph receiving no reimbursement at the time of the transfer of the property or since.

Marion and Donna attempt to establish that the unjust enrichment constructive trust does not apply in this case and allege that (1) the alleged constructive trust is based only on an oral agreement, contrary to the finding in *Rawlings* set forth above; (2) that

Ralph received money from his parents equivalent to the amount received by Sterling (without stating what that amount was), and (3) Ralph did not contribute economically or otherwise to the care and upkeep of the farm.

Marion also suggests that the determination of a constructive trust is moot because in 1980 the parties discussed the property, Sterling after 1990 declined his share of the property, and Marion consulted with an attorney (which consultation was never communicated to Ralph). At this point, a trust should have already been determined to be in place and the question is whether a sufficient repudiation as required by *Walker* and more fully discussed above.

First, as set forth in *Rawlings*, an oral agreement may establish a constructive trust – particularly where the "person holding title to the property is subject to an equitable duty to convey it to another" such as is the case here. *Id.* at 29. The fact that the agreement was oral is irrelevant. Next, Marion and Donna retained the property at a detriment to Ralph: unlike Marion, Donna, and Sterling, Ralph received no money from the proceeds of the loan. Any alleged gifting of money to Ralph from his parents was from his parents, not Marion and they could choose how they wished to spend their money. Furthermore, Marion only alleges that Ralph did not repay the money and does not produce any evidence that he had full knowledge of his parent's finances. And as set forth above, Ralph contributed economically to the property when he followed his father's, not Marion's, request that his proceeds from the property be used to support the farm in 1955, more than ten years before the 1966 transfer of the property. From 1955 on, Ralph's portions of the proceeds went to assist in the upkeep and maintenance and improvements on the property. Furthermore, even if Ralph had not provided this

financial assistance, the *Walker* court affirmed that "It is generally recognized that where one co-owner does something for the protection of their common property, it is presumed that his action was to preserve it for the benefit of all unless some indication to the contrary plainly appears." 17 Utah 2d at 58. As set forth above, this case is similar to *Walker*, because Marion never asked for assistance for maintenance of the farm, Ralph contributed to the maintenance of the farm, Marion never indicated to Ralph that he believed he owned all of the property himself, and there was no concealment or wrongdoing.

Even if the trial court did not find the existence of a constructive trust in 1966, which would have required the finding of a repudiation, the court did determine that there were material facts and should have stopped there and denied summary judgment: "[t]his Court still cannot say, as a matter of law, that a constructive trust should be imposed." (R. 386).

V. THE AFFIDAVITS OF THE RALPH DAVIS, SR. CHILDREN ARE ADMISSIBLE

Finally, Marion and Donna assert that the affidavits of Bette Davis Stratton ("Bette"), Ralph Davis, Jr. (Ralph, Jr.) and Glen Richard Davis ("Glen"), were inappropriately determined to be inadmissible hearsay evidence and that Rule 601(c) of the UTAH RULES OF EVIDENCE does not apply. The Ralph Davis Estate, however, affirmatively asserts that Rule 601(c) of the UTAH RULES OF EVIDENCE does apply.

Marion and Donna assert that this dispute is merely a property dispute and not a dispute involving an estate. Marion and Donna are correct that this matter concerns property, but they are incorrect that it does not concern an estate. This matter concerns

property that should be part of the estate of Ralph Davis Estate and that was believed by Ralph Davis and his heirs was a part of the Estate.

Additionally, the statements contained in the affidavits have probative value in that they establish what Ralph Davis communicated to his children regarding his interest in the property. They establish a history that Ralph and his wife discussed property issues with their children and that they never communicated to their children that the property had been transferred. (R. 258-271). The affidavits establish that Ralph continued to tell his children and to believe that the property was his even after 1980, 1990, and 1994 claimed statements by Marion. *Id.* The affidavits establish their presence in conversations between Ralph and Marion. *Id.* All evidence of conversations that Marion had with Ralph regarding the property were conversations where he, his wife, Ralph and Sterling were the only participants and where Marion's assertions of Ralph's statements cannot be evaluated for truthfulness just as Marion and Donna argues that Ralph's children's affidavits cannot be evaluated for truthfulness.

Finally, the statements made to Bette, Ralph, Jr. and Glen, were statements made when Ralph, Sr. was "perceiving" and discussing his understanding of his interest in the property and at times when his interest was clear. For example, Bette was present during the meeting of the three brothers in 1980 and has first-hand knowledge of the discussions that took place in 1980 relating to the reconveyance of her father's interest in the property. (R. 309; 268-71). Glen had regular conversations with his parents about the status of their claim, which occurred after 1997-1998. (R. at 308; 263-266). Ralph, Jr. Spent approximately eight weeks with his father just prior to his death on February 25,

2005 discussing the property and his father's belief that the property would be returned to him. (Record at 307-08, 258-61).

The statements, then made to Bette, Ralph, Jr., and Glen by Ralph, Sr., therefore provide additional material statements of fact that should have been determined by the court to preclude a finding that the statute of limitations should be applied and that a repudiation had not occurred or had not been made clear to Ralph, Sr. Specifically, Glen testified that in 1980, his mother and father understood that the property was still co-owned by all three brothers, but that they expressed a desire for its physical division instead of a co-ownership. (Record at 308; 263-266). Glen stated his father's understanding that Marion should continue to use the property so long as Ralph, Sr. didn't have a use for it, but did not express a disavowal of his interest in the property. (Record at 308;263-266). Ralph, Jr. testified that his father continued to affirm his interest in the property just prior to his death in February 2005 and his belief that his brother was still intending to return the property to him. (Record at 307-08; 258-61). Bette testified that after the funeral that her father attended with his brothers, that he never talked of any intent to turn his interest in the farm over to Marion and that he never after that his interest in the farm, but believed that he still held it. (Record at 307, 268-71). Although Marion asserts that Ralph, Sr. relinquished any claim, these statements demonstrate that Ralph, Sr. understood that no repudiation occurred and that his interest continued. (R. 370, 220).

CONCLUSION

Pursuant to Rule 56 of the Utah Rules of Civil Procedure, a summary judgment decision in favor of the moving party may only be made when there are no issues of

material fact and when judgment is required as a matter of law. In the instant matter, there are, first, material issues of law that precluded the grant of summary judgment to the Appellee, including, the trial court's narrow interpretation and application of what constitutes a constructive or oral trust; the court's failure to recognize the application of the exceptional circumstance in familial constructive trust claims and the application of the discovery rule; the court's determination that the statute of limitations runs after the purpose of the trust has been resolved rather than after a clear repudiation of the trust. There are also material issues of fact precluding summary judgment that preclude a finding that no trust existed in 1966 under the *Rawlings* standard; and that preclude a finding a repudiation occurred. Because there are issues of law and of fact that are not properly resolved at the summary judgment stage, this Court should overturn the trial court's finding that no trust existed in 1966 and that the statute of limitations bars the Plaintiff's prosecutions of its claims.

DATED and SIGNED this 18th day of February, 2011.

JEFFS & JEFFS, P.C.

M. Dayle Jeffs

CERTIFICATE OF SERVICE

I hereby certify that the original Brief of Plaintiff, Appellant, and Counterdefendant, The Estate of Ralph O. Davis, Sr. or The Ralph O. Davis, Sr., Trust, together with required copies, was hand delivered to the Clerk of the Court, in the Utah Court of Appeals and two copies to the below named party by hand-delivery, this 18th day of February, 2011, to the location as follows:

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